

TWO MODELS FOR DISCHARGE OF A CONTRACT BY REPUDIATION

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ABSTRACT. *This article compares two models of discharge for repudiation. The first – termed the “mirror image model” – has come to the fore only in recent years. It treats the applicable principles as the mirror image of those that govern discharge for failure to perform a contractual term. Under the second model – the “differentiated model” – repudiation is analysed in terms of various criteria that respond to conceptual diversity within the basis for discharge. The two models diverge, at the heart of the repudiation doctrine, when the issue is whether a reasonable person would regard the promisor as having refused to perform the contract. It is argued that the differentiated model is the better model, and also the preferred view of the common law.*

KEYWORDS: *contract, repudiation, refusal to perform, prospective breach, performance insecurity.*

I. INTRODUCTION

“Repudiation”, as a basis for the discharge of a contract, has proved troublesome. Its terminology is confusing, as is its association (through the concept of “ready and willing” to perform) with long defunct pleading rules. Further challenges are presented by the diversity in the doctrine,¹ and its interaction with other bases for discharge of contract.

At the heart of the repudiation doctrine is the ability of a promisee to justify an election to terminate the performance of a contract by proving that a reasonable person in the promisee’s position would have regarded the promisor’s

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¹ See *Peter Lind & Co. Ltd. v Constable Hart & Co. Ltd.* [1979] 2 Lloyd’s Rep. 248, 253, per Mustill J.

prior conduct as a *refusal to perform* the contract. The conclusion relates to the promisor's intention. The reference point is the "obligation to perform" assumed by the promisor on entry into a contract. Diversity in the doctrine comes from the variety of situations in which a refusal to perform may occur, and the doctrine's application to situations other than refusal to perform.

Repudiation stands in contrast to the two other common law bases for discharge: breach of condition and breach of an intermediate (or "innominate") term. There is no requirement for the promisee to prove *failure to perform* a term of the contract. Repudiation may, however, overlap with these other bases because a failure to perform which in itself justifies termination by the promisee (such as breach of condition) may also evidence a refusal to perform.

This paper evaluates two models for repudiation, mainly from the perspective of how they deal with the concept of refusal to perform. We call the two models the "mirror image model" and the "differentiated model". The differentiated model has, until recently, reflected the conventional understanding of the doctrine. It encompasses distinct lines of authority, addressing different situations, that have developed under the rubric of "repudiation". The mirror image model, gaining credence in recent decisions, is a novel attempt at unification though it is not clear whether this attempt is being carried out consciously or simply because of misunderstanding of the legal principles that inform repudiation. In basic terms, it conceives of repudiation and discharge for breach as being governed by equivalent principles; the difference between them is essentially temporal.

Text writers are divided on which model is right.² In our view, the straightforward approach of the mirror image model is beguiling. We argue in favour of the differentiated model and therefore urge a return to orthodoxy. The remainder of the paper develops that argument as follows. In the next section we compare the two models in detail. The third section traces the development of the repudiation doctrine, to examine the role of the concept of refusal to perform. Sections four to seven expose the failings of the mirror image model. These include objections in principle and objections as to its practical application. In short, the model has significant flaws, which outweigh simplicity in formulation as its only redeeming quality. The final section contains our conclusions.

² Apparently supporting (some form of) the differentiated model are: N. Andrews, M. Clarke, A. Tettenborn and G. Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies*, 2nd ed. (London 2017), ch. 6, but cf. paras. 8–001 to 8–025; N. Andrews, *Contract Rules* (Cambridge 2016), Articles 137, 141, but cf. Articles 138, 147; J.E. Stannard and D. Capper, *Termination for Breach of Contract* (Oxford 2014), §7.16; J.W. Carter, *Carter's Breach of Contract (Hart Edition)* (Oxford 2012), ch. 7; G.H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford 1988), 380. Supporting the mirror image model are: Qiao Liu, *Anticipatory Breach* (Oxford 2011), esp. chs. 3, 4; A. Burrows, *A Restatement of the English Law of Contract* (Oxford 2016), 110–11; H. Beale (ed.), *Chitty on Contracts*, 32nd ed. (London 2015), paras. 24–018, 24–027.

II. THE TWO MODELS

A. Features

Four situations may be analysed under the heading “repudiation”. First, the promisor may have expressly refused to perform the contract, as in *Hochster v De la Tour*,³ the root of the modern law. Second, a refusal may be inferred if a reasonable person in the position of the promisee would regard what the promisor has said and done as amounting to a refusal to perform. In this situation, the promisor’s conduct need not extend to all of its unperformed obligations,⁴ though to give rise to a right to elect to terminate a contract for repudiation, conduct that is confined to some aspect of the contract must still pass a threshold of materiality.⁵ Of course, such a refusal may also raise doubts about the promisor’s intention to perform the contract in other respects. Further speculation is not, however, required. A refusal to perform in a material respect may be treated as a repudiation of the whole contract.

Third, a prospective breach evidenced by the threat to breach a term of the contract may be a repudiation, as in *Federal Commerce and Navigation Co. Ltd. v Molena Alpha Inc.*⁶ Fourth, a promisor may be unable to perform as a matter of fact. *Universal Cargo Carriers Corp. v Citati*⁷ is the classic case. A shipowner was entitled to terminate a voyage charterparty because the charterer was “wholly and finally disabled”⁸ from performing the contract.

One repudiation model, which we call the “mirror image model”, analyses the above situations on the basis that the contrast between discharge for refusal to perform and discharge for failure to perform is, at bottom, purely temporal. Whether a promisor’s conduct is a repudiation – including by refusal to perform – therefore depends on the failure to perform it portends. For example, in *Geden Operations Ltd. v Dry Bulk Handy Holdings Inc. (The M/V Bulk Uruguay)*⁹ Popplewell J. said: “[T]he breach of contractual obligations, which the [promisor’s] conduct anticipates that he cannot or will not perform, must be of the same character as would entitle [the

³ *Hochster v De la Tour* (1853) 2 E. & B. 678; 118 E.R. 922. See note 34 below.

⁴ See e.g. *Aktieselskabet Pitwood v J.W. Baird & Co. Ltd.* (1926) 24 Ll L. Rep. 282, esp. 284–85, per Bankes L.J., 288, per Atkin L.J. (cif contract for sale of goods, seller resiling from agreed point of discharge), discussed in Andrews et al., *Contractual Duties*, paras. 6–071 to 6–074.

⁵ See also note 118 below (material increase to the risk of non-performance). Cf. *Aktieselskabet Pitwood* (1926) 24 Ll L. Rep. 282, 284–85, per Bankes L.J. The seller’s refusal in that case was, in any event, material.

⁶ *Federal Commerce and Navigation Co. Ltd. v Molena Alpha Inc.* [1979] A.C. 757. See below, text at fn. 48.

⁷ *Universal Cargo Carriers Corp. v Citati* [1957] 2 Q.B. 401.

⁸ *British and Beningtons Ltd. v North Western Cachar Tea Co. Ltd.* [1923] A.C. 48, 72, per Lord Sumner (with whom Lords Buckmaster, Wrenbury and Carson agreed).

⁹ *Geden Operations Ltd. v Dry Bulk Handy Holdings Inc. (The M/V Bulk Uruguay)* [2014] EWHC 885 (Comm); [2014] 2 Lloyd’s Rep. 66, at [15].

promisee] to treat himself as discharged if it occurred after the time for performance had arisen.”

On this approach, principles of discharge for repudiation mirror those applicable to discharge for breach. Other recent¹⁰ cases in which this model has come to the fore include *Ampurius Nu Homes Holdings Ltd. v Telford Homes (Creekside) Ltd.*,¹¹ *Urban 1 (Blonk Street) Ltd. v Ayres*¹² and *Spar Shipping AS v Grand China Logistics Holding (Group) Co. Ltd. (The Spar Capella)*.¹³ The United Nations Convention on Contracts for the International Sale of Goods 1980¹⁴ operates analogously.

To apply the model, a promisor’s conduct must be “translated” into a failure to perform. An equivalent process applies when discharge is based on factual inability: the promisor’s actual position when the promisee elected to terminate must be translated. If the translation process does not lead to breach of condition, discharge depends on satisfaction of the test for failure to perform an intermediate term. Unsurprisingly, the model adopts the criterion stated by Diplock L.J. in *Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd.*¹⁵ Applying the “*Hongkong Fir* criterion”,¹⁶ the question is whether the promisor’s conduct would translate into a breach (or breaches) depriving the promisee of “substantially the whole benefit which it was intended that he should obtain from the contract”. The model is also applicable to conduct (or inability) after arrival of the time for performance. Any overlap with discharge for failure to perform is more apparent than real; either because the “same test applies to actual breaches”¹⁷ or because proof of a common law right of discharge *always* signifies “repudiation” by the promisor.¹⁸ The mirror image model thus conceives that direct translation of a promisor’s conduct (or position) into actual breach is a kind of “golden thread” in proof of repudiation.

The second model, which we term the “differentiated model”, does not aspire to such a degree of uniformity. It employs different criteria to respond to conceptual diversity in the four situations that we have

¹⁰ Traces can be found in *Thorpe v Fasey* [1949] 1 Ch. 649, 661, per Wynn-Parry J. Cf. *Universal Cargo Carriers Corp.* [1957] 2 Q.B. 401, 438, per Devlin J.

¹¹ *Ampurius Nu Homes Holdings Ltd. v Telford Homes (Creekside) Ltd.* [2013] EWCA Civ 577; [2013] 4 All E.R. 377.

¹² *Urban 1 (Blonk Street) Ltd. v Ayres* [2013] EWCA Civ 816; [2014] 1 W.L.R. 756.

¹³ *Spar Shipping AS v Grand China Logistics Holding (Group) Co. Ltd. (The Spar Capella)* [2016] EWCA Civ 982; [2016] 2 Lloyd’s Rep. 447.

¹⁴ *Final Act of the United Nations Conference on Contracts for the International Sale of Goods, United Nations*, Doc A/CONF 97/18, 10 April 1980, Annex I (“CISG”). See further note 113 below. CISG has not been adopted in the UK.

¹⁵ *Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26, 69 (“*Hongkong Fir*”).

¹⁶ Other criteria are also invoked, on the basis that they are interchangeable. References to the “*Hongkong Fir* criterion” should be read accordingly.

¹⁷ *Ampurius Nu Homes Holdings Ltd.* [2013] 4 All E.R. 377, at [63], per Lewison L.J. (with whom Longmore and Tomlinson L.J.J. agreed).

¹⁸ See e.g. *Parbulk II AS v Heritage Maritime Ltd. (The Mahakam)* [2011] EWHC 2917 (Comm); [2012] 1 Lloyd’s Rep. 87, at [31], per Eder J. (breach of condition an “actual repudiation”).

identified, namely, express refusal to perform, inferred refusal to perform, prospective breach and factual inability. The translation process which characterises the mirror image model is only necessary under the differentiated model if refusal to perform cannot be proved, so that the promisee must rely on prospective breach or factual inability. Overlap with discharge for failure to perform can occur for conduct after the arrival of the time for performance. This is because an actual breach for which the promisee is entitled to terminate may also, in appropriate circumstances, in itself evidence repudiation by the promisor.¹⁹ The differentiated model applies in Australia²⁰ and New Zealand.²¹ In our view, the model tracks English law more accurately than the mirror image model, and is also the better model.

B. Divergence

For both models, a promisor's express refusal to perform referable to all its unperformed duties is prima facie a repudiation; likewise, a prospective breach of the requisite degree of seriousness. The two models also agree on the process and criterion applied to establish factual inability.²² However, they can be seen to diverge at the heart of the repudiation concept, that is, where refusal to perform is sought to be inferred from conduct that is (at least in terms) referable to less than all of a promisor's unperformed duties. Under the differentiated model, inferred refusal to perform stands as a separate category. Under the mirror image model, the category has been swallowed up by prospective breach analysis.

Two examples may be given of statements of principle that invoke the mirror image model. In *Urban 1*, Sir Terence Etherton C. (with whom Underhill L.J. agreed) said²³ that repudiation can be inferred if the promisor "demonstrated an intention" to perform "in a manner substantially inconsistent with his or her contractual obligations *such as to* deprive the other party of substantially the whole benefit which it was intended they [*sic*] should receive under the contract". Similarly, in *The Spar Capella* the Court of Appeal affirmed Popplewell J.'s conclusion²⁴ that charterers had "renounced" several time charterparties by "objectively evincing an intention not to perform the charters *in a way which* deprived [the owners] of substantially their whole benefit". While the syntax of the latter is awkward, each statement begins with a traditional refusal-to-perform test: an intention

¹⁹ *Aktieselskabet Pitwood* (1926) 24 Ll L. Rep. 282, 288, per Atkin L.J.

²⁰ See *Koompahtoo Local Aboriginal Land Council v Sanpine Pty. Ltd.* [2007] HCA 61; (2007) 233 C.L.R. 115.

²¹ See note 60 below.

²² However, the statement of the mirror image model in *The M/V Bulk Uruguay* [2014] EWHC 885 (Comm); [2014] 2 Lloyd's Rep. 66, at [15] omits factual inability.

²³ *Urban 1* [2013] EWCA Civ 816; [2014] 1 W.L.R. 756, at [44].

²⁴ *The Spar Capella* [2015] EWHC 718 (Comm); [2015] 2 Lloyd's Rep. 407, at [212].

to perform in a “substantially inconsistent” manner; and “evincing an intention not to perform”. We have added italics to show use of the *Hongkong Fir* criterion to apply the mirror image model.

The differentiated model is applied differently. Since the issue is whether a reasonable person would consider that the promisor repudiated its obligation to perform the contract in accordance with its terms, a promisor’s intention is evaluated at the *level of obligation* rather than at the level of consequences. It is irrelevant that some (or all) of the promisor’s duties had not accrued due because the obligation to perform a contract is assumed on formation. In the two quotations, what we have described as “traditional tests” are sufficient; their satisfaction justifies the conclusion that the promisor repudiated its obligation to perform. Application of those tests does not require direct translation of the conduct at issue into specific breaches.²⁵ Indeed, translation might not even be feasible in the circumstances.²⁶

However, a prospective breach may also be a basis for termination under the differentiated model. Thus, if a promisor’s threat to breach a contractual term does not qualify as a refusal to perform, the translation process may still be used to establish repudiation. The threat is projected forward and the same standard is applied as for the mirror image model.²⁷

C. Problems with the Mirror Image Model

The mirror image model presents four problems. First, while the model is usually derived from *Federal Commerce*, the case concerned what we have termed “prospective breach”. Second, reliance on the *Hongkong Fir* criterion compromises the distinction between refusal to perform and failure to perform. Third, a substantial body of authority is left unexplained by the mirror image model. Fourth, the model undermines use of the repudiation doctrine as a mechanism to deal with performance insecurity.

Prior to turning to these problems we outline by way of background salient points in the development of repudiation as a basis for discharge.

III. DEVELOPMENT OF THE DOCTRINE OF REPUDIATION

A. Origins

In the way of the common law, the doctrine of repudiation has developed incrementally. Old cases on the enforcement of dependent promises are the source. A plaintiff’s averment of performance (or readiness and willingness to perform) became immaterial²⁸ following the defendant’s refusal to

²⁵ See note 4 above (requirement of materiality).

²⁶ See note 104 below.

²⁷ See note 59 below.

²⁸ See e.g. *M’Clure v Ripley* (1850) 5 Ex. 140, 144; 155 E.R. 60, 62, per Patteson J. (for the Exchequer Chamber).

perform. Failure to aver fulfilment of a condition precedent to the defendant's obligation to perform could not then be raised as a defence to an action for damages. "Repudiation" therefore operated by way of excuse.²⁹

Rights analogous to the positive rights of discharge and damages available today were, however, recognised in decisions from the early nineteenth century concerning promisors who intentionally disabled themselves from performing. If A promised to marry B, or agreed to lease land or sell specific goods to B, it was a disabling act for A to marry C, or to lease the land or sell the goods to C.³⁰ B enjoyed an *immediate* right to damages even though A's conduct may have preceded the time for performance. It was irrelevant that C might die prior to the agreed time for A's marriage to B, or that A might procure a surrender of the lease or repurchase the goods from C.³¹ Mere uncertainty as to performance by A was not the rationale,³² and no less an authority than Parke B.³³ denied that the decisions could be extended to statements of intention capable of being retracted. The contrary decision in *Hochster* was therefore a controversial legal landmark.³⁴

Having engaged the plaintiff as his courier for a grand tour, the defendant in *Hochster* told the plaintiff that his services were not required. The Court of Queen's Bench upheld the plaintiff's damages claim on a writ issued before performance was due to commence. Given the dependent promise cases, Lord Campbell C.J. said³⁵ the plaintiff was "at liberty to consider himself absolved from any future performance of [the contract], retaining his right to sue for any damage he has suffered from the breach of it". The striking feature of the decision was that the court saw no reason to require the plaintiff to delay his claim for damages.³⁶

B. Evolution

Later cases grappled with difficulties of concept and terminology, and with the interaction between discharge for refusal to perform and discharge for failure to perform. The law also continued to evolve, by recognising factual

²⁹ See e.g. *Jones v Barkley* (1781) 2 Doug. 684, 695; 99 E.R. 434, 440, per Buller J.

³⁰ See (respectively) *Short v Stone* (1846) 8 Q.B. 358; 115 E.R. 911; *Ford v Tiley* (1827) 6 B. & C. 325; 108 E.R. 472; *Bowdell v Parsons* (1808) 10 East 359; 103 E.R. 811.

³¹ See e.g. *Short* (1846) 8 Q.B. 358, 369–70; 115 E.R. 911, 915, per Patteson J. (if A promised to marry B but married C, proof that C was living when the action was brought was unnecessary).

³² For a contrary view, see *The M/V Bulk Uruguay* [2014] EWHC 885 (Comm); [2014] 2 Lloyd's Rep. 66, at [21].

³³ See e.g. *Philpotts v Evans* (1839) 5 M. & W. 475, 477; 151 E.R. 200, 202.

³⁴ See e.g. S. Williston, "Repudiation of Contracts" (1901) 14 Harv.L.Rev. 317, 421; Sir M. Mustill, "Anticipatory Breach", *Butterworth Lectures 1989–90* (London 1990); P. Mitchell, "Hochster v De La Tour (1853)" in C. Mitchell and P. Mitchell (eds.), *Landmark Cases in the Law of Contract* (Oxford 2008), 135.

³⁵ *Hochster* (1853) 2 E. & B. 678, 690; 118 E.R. 922, 926. Cf. J.W. Carter, "Discharge as the Basis for Termination for Breach of Contract" (2012) 128 L.Q.R. 283, at 295–97.

³⁶ The ability to withdraw a verbal repudiation was recognised. See *Hochster* (1853) 2 E. & B. 678, 693; 118 E.R. 922, 927.

inability to perform and prospective breach as bases for discharge analysed under the repudiation rubric.

Since “repudiation” has a variety of legal meanings, terminological confusion has often been lamented.³⁷ One meaning is “rescission”.³⁸ A promisor’s “repudiation” may be effective to rescind a contract, or ineffective to do so and therefore “wrongful”. Although less frequent today, usage equating repudiation and rescission (in the sense of “termination”) has been common in cases on discharge. For example, Salmon J. referred³⁹ at first instance in *Hongkong Fir* to the “charterers’ alleged wrongful repudiation [*scil* ‘wrongful rescission’]”, and to whether they “were entitled to repudiate [*scil* ‘rescind’]” the contract.

This sense of “repudiation” also served to define what had to be proved. For example, in *Mersey Steel and Iron Co. Ltd. v Naylor Benzon & Co.*⁴⁰ Lord Selborne L.C. said the promisor’s conduct must be “such as would amount to a rescission if he had the power to rescind”. Since an election to rescind must be unequivocal, only conduct by which a promisor unequivocally evinces an intention not to be bound by the contract is a (wrongful) repudiation. The idea underlies Lord Coleridge C.J.’s classic statement in *Freeth v Burr*⁴¹ that “the real matter for consideration is whether the acts or conduct of the [promisor] do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract”. This was approved as a test for repudiation in *Mersey*, a case important to the interaction between refusal to perform and failure to perform.

In *Mersey*, buyers under an instalment contract for the sale of iron wrongly – but in good faith – believed that presentation of a petition to wind up the sellers prevented payment without court sanction. They withheld payment for goods delivered on that basis. The sellers contended that this was a repudiation; alternatively, the buyers’ failure to pay was a breach of condition, or a sufficiently material breach. These contentions failed. As to repudiation, Lord Blackburn said:

There was a statement that for reasons which [the buyers] thought sufficient they were not willing to pay for the iron at present; and if that statement had been an absolute refusal to pay, saying, “Because we have power to do wrong we will refuse to pay the money that we ought to pay,” I will not say that it might not have been evidence to go to the jury for them to say whether it would not amount to a refusal to go on with the contract in future, for a man might reasonably so consider it. But there is nothing of that kind here; it was a bona fide statement, and a very plausible statement.⁴²

³⁷ See e.g. *Heyman v Darwins Ltd.* [1942] A.C. 356, 378, per Lord Wright.

³⁸ For another context, see *Steinberg v Scala (Leeds) Ltd.* [1923] 2 Ch. 452, 464, per Younger L.J. (rescission of a minor’s contract binding unless “repudiated”).

³⁹ *Hongkong Fir* [1962] 2 Q.B. 26, 32, 33, respectively.

⁴⁰ *Mersey Steel and Iron Co. Ltd. v Naylor Benzon & Co.* (1884) 9 App. Cas. 434, 438–39.

⁴¹ *Freeth v Burr* (1874) L.R. 9 C.P. 208, 213.

⁴² *Mersey Steel and Iron Co. Ltd.* (1884) 9 App. Cas. 434, 443.

Since Lord Coleridge C.J.'s test was not satisfied, the buyers had not refused to perform the contract.

Dealing with the failure to perform, Lord Blackburn continued:

The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something . . . , if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct".⁴³

Having construed the agreement, he concluded that the buyers' breach did not go to the "root of the contract": their failure to pay was neither a breach of condition nor a sufficiently material breach. We return later to the contrast in Lord Blackburn's judgment.⁴⁴

Refusal to perform is now somewhat broader than conduct amounting to a "rescission".⁴⁵ Even though the criterion is objective, bona fides remains relevant. Thus, Lord Wright explained in *Ross T. Smyth & Co. Ltd. v T.D. Bailey Son & Co.*:

I do not say that it is necessary to show that the party alleged to have repudiated should have an actual intention not to fulfil the contract. He may intend in fact to fulfil it, but may be determined to do so only in a manner substantially inconsistent with his obligations, and not in any other way. However, a mere honest misapprehension, especially if open to correction, will not justify a charge of repudiation.⁴⁶

Extensive case law has led to recognition of certain presumed positions. For example, wrongful termination of a contract, or a denial that a contract exists, is prima facie a repudiation.⁴⁷

IV. FEDERAL COMMERCE: REPUDIATION BY PROSPECTIVE BREACH

The first problem with the mirror image model is its supposed⁴⁸ derivation from the judgment of Lord Wilberforce (with which Lord Scarman and Viscount Dilhorne⁴⁹ agreed) in *Federal Commerce*.

Shipowners objected to certain deductions from hire under three time charterparties, for matters such as "slow steaming". To bring the charterers

⁴³ *Ibid.*, at pp. 443–44.

⁴⁴ See note 80 below.

⁴⁵ Lord Blackburn's requirement of an "absolute refusal" must now be taken with a grain of salt. See e.g. *Warinco AG v Samor SpA* [1979] 1 Lloyd's Rep. 450, 454, per Stephenson L.J.

⁴⁶ *Ross T. Smyth & Co. Ltd. v T.D. Bailey Son & Co.* [1940] 3 All E.R. 60, 72. The other members of the House of Lords agreed.

⁴⁷ See e.g. *Atlantic Underwriting Agencies Ltd. v Compagnia di Assicurazione di Milano SpA* [1979] 2 Lloyd's Rep. 240; *Dolphin Hellas Shipping S.A. v Itemslot Ltd. (The Aegean Dolphin)* [1992] 2 Lloyd's Rep. 178, 186, per Hobhouse J. See further below, text at fn. 130 (noncompliance with notice to perform).

⁴⁸ See e.g. *Urban 1* [2013] EWCA Civ 816; [2014] 1 W.L.R. 756, at [44].

⁴⁹ Except that he considered the breach to be actual.

to heel, the owners threatened to instruct the vessels' masters not to sign any bill of lading endorsed "freight prepaid", and to insist that the bills be "clauséd" to incorporate the charter terms. The charterers' riposte was to terminate the contracts.⁵⁰ For three members of the House of Lords the owners' conduct was a clear threat to breach cl. 9 of the charters, which provided for the masters to be under the charterers' orders as regards the vessels' employment.⁵¹ Extrapolating the owners' threat to become an actual breach, it was accepted⁵² that termination was justified if cl. 9 was a condition. However, as cl. 9 was an intermediate term, the matter depended on what consequences would have ensued. The umpire found that the vessels would have been barred from the CIF trade, and the charterers' reputation seriously damaged. These findings were unanimously held to justify the charterers' termination.

Lord Wilberforce made three points in discussing repudiation. First, analysing the issue as one of prospective breach, he asked⁵³ whether the "threatened breach" entitled the charterers to terminate the contracts. Because cl. 9 was an intermediate term, the "critical question" was whether the threat was "repudiatory".

Second, Lord Wilberforce illustrated his view⁵⁴ that the "form of the critical question may differ slightly as it is put in relation to varying situations" by quoting⁵⁵ the tests in *Freeth and Smyth*, the *Hongkong Fir* criterion⁵⁶ and the following statement by Buckley L.J. in *Decro-Wall International S.A. v Practitioners in Marketing Ltd.*:

To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract. . . . Will the consequences of the breach be such that it would be unfair to the injured party to hold him to the contract and leave him to his remedy in damages . . .?⁵⁷

Third, Lord Wilberforce concluded: "The difference in expression between these two last formulations does not, in my opinion, reflect a divergence of principle, but arises from and is related to the particular contract under consideration: they represent, in other words, applications to different contracts, of the common principle that, to amount to repudiation a breach must go to the root of the contract."⁵⁸

⁵⁰ The charters continued under a without prejudice agreement. Hire at the (lower) market rate was payable if the charterers' termination was upheld.

⁵¹ Because the instruction had been given to the masters, the others thought the breach was actual. The "majority" emphasised that termination preceded action on the instruction.

⁵² See *Federal Commerce and Navigation Co. Ltd.* [1979] A.C. 757, 778, per Lord Wilberforce, 783, per Lord Fraser.

⁵³ *Ibid.*, at p. 778.

⁵⁴ *Ibid.*, at p. 778.

⁵⁵ *Ibid.*, at pp. 778–79.

⁵⁶ *Hongkong Fir* [1962] 2 Q.B. 26, 72. The passage is to the same effect as that quoted in note 15 above.

⁵⁷ *Decro-Wall International S.A. v Practitioners in Marketing Ltd.* [1971] 1 W.L.R. 361, 380.

⁵⁸ *Federal Commerce and Navigation Co. Ltd.* [1979] A.C. 757, 779.

Both repudiation models agree that the correct approach in *Federal Commerce* was to translate (extrapolate) the owners' threat into actual breach. However, the rationalisations differ. For the differentiated model, proof of repudiation by refusal to perform was problematic because the owners had acted bona fide on the basis of legal advice. Their threat was, nevertheless, a sufficiently serious prospective breach because the *Hongkong Fir* criterion was satisfied. Thus, it was a case involving reliance on one basis for proving repudiation when another was inapplicable. Under the mirror image model, the rationale is that Lord Wilberforce treated the translation process (and use of the *Hongkong Fir* criterion) as universal to proof of repudiation. For example, the Chancellor's statement⁵⁹ in *Urban 1* recalls Lord Wright's test in *Smyth* by referring to a promisor who has acted "in a manner substantially inconsistent with his or her contractual obligations". Lord Wilberforce's judgment is cited to justify inclusion of the *Hongkong Fir* criterion, that is, as a gloss on Lord Wright's test.

In our view, Lord Wilberforce's judgment conforms to the differentiated model, including the distinction between refusal to perform and prospective breach.⁶⁰ His remarks about the "two last formulations" and the "common principle" were confined to the criteria of Diplock L.J. and Buckley L.J.⁶¹ The latter's test was expressly directed to threatened breach, and at no point did Lord Wilberforce suggest that the *Hongkong Fir* criterion determines whether the tests stated in *Freeth* and *Smyth* are satisfied.⁶² His reference to the "varying situations" thus illustrates the common sense view that the applicable test depends on the circumstances.⁶³ These points were substantially confirmed by *Woodar Investment Development Ltd. v Wimpey*

⁵⁹ See note 21 above. See also *Valilas v Januzai* [2014] EWCA Civ 436; [2015] 1 All E.R. (Comm.) 1047, at [52], per Floyd L.J. (with whom Arden L.J. agreed). Contrast *SK Shipping (S) Pte Ltd. v Petroexport Ltd. (The Pro Victor)* [2009] EWHC 2974 (Comm); [2010] 2 Lloyd's Rep. 158, at [86], per Flaux J. The same point may perhaps be inferred from comparison of A.G. Guest (ed.), *Chitty on Contracts*, 24th ed. (London 1977), paras. 1479–1482 with the corresponding paras in the current edition, as cited in note 2 above.

⁶⁰ The charterers put their case in terms of the distinction. See *Federal Commerce and Navigation Co. Ltd.* [1979] A.C. 757, 769, 770. The distinction is integral to the Contract and Commercial Law Act 2017 (NZ). Section 36(1)(a) confers a right to terminate ("cancel") for refusal to perform ("words or conduct" by which a promisor makes "clear that he does not intend to perform his obligations"). Section 37 confers a cancellation right for prospective breach (when it is "clear" that the promisor will breach an "essential" term or commit a breach satisfying the *Hongkong Fir* criterion).

⁶¹ Curiously, in the key passage as reported in *Federal Commerce and Navigation Co. Ltd.* [1979] A.C. 757, 778–79, although the quotation of the *Hongkong Fir* criterion begins a new line, the text appears to run on from Lord Wright's test in *Smyth* [1940] 3 All E.R. 60. Other reports of *Federal Commerce and Navigation Co. Ltd.* [1979] A.C. 757 contain slightly different versions of this passage, but in all the *Hongkong Fir* criterion is clearly separated from Lord Wright's test: see [1979] 3 W.L.R. 991, 999; [1979] 1 All E.R. 307, 314; [1979] 1 Lloyd's Rep. 201, 207. That intention is made clear by Lord Wilberforce's observations immediately following.

⁶² See *Valilas* [2014] EWCA Civ 436; [2015] 1 All E.R. (Comm.) 1047, at [34], per Underhill L.J. Nor did Lord Wilberforce equate all the quoted formulations with the conclusory test that the "breach must go to the root of the contract". But cf. *Devonport Borough Council v Robbins* [1979] 1 N.Z.L.R. 1, 24, per Cooke and Quilliam JJ.

⁶³ Cf. *Sentinel International Ltd. v Cordes* [2008] UKPC 59, at [43], per the court; *Kuwait Rocks Co. v AMN Bulkcarriers Inc. (The Astra)* [2013] EWHC 865 (Comm); [2013] 2 Lloyd's Rep. 69, at [21]ff., per Flaux J.

*Construction UK Ltd.*⁶⁴ The question was whether Wimpey refused to perform a sale of land contract by purporting to exercise an express right to “rescind” in circumstances which did not activate the right. There was a sharp difference of opinion on whether, as the majority (including Lord Wilberforce) held, Wimpey’s bona fides meant that it had not refused to perform the contract. However, the judgments unite in treating the traditional tests as sufficient.⁶⁵ *Freeth* figures prominently. *Hongkong Fir* is nowhere to be seen.

The issues of principle on which the two repudiation models conflict are the scope of the prospective breach analysis and its relationship with refusal to perform. For the mirror image model repudiation is always approached in terms of prospective breach.⁶⁶ Yet, analysis in those terms is conspicuously absent from *Freeth*, *Mersey* and *Smyth* even though all concerned allegations that conduct directed to specific obligations amounted to a refusal to perform. In addition, *Federal Commerce* involved bona fide conduct, but that is not typical of refusal-to-perform cases. The decision also illustrates that clear evidence of the breach and (unless the term is a condition) its likely consequences is necessary. By contrast, for the differentiated model recourse to prospective breach is unnecessary if the promisor’s intention – to refuse to perform – is “clear”,⁶⁷ or “quite plain”.⁶⁸

V. REFUSAL TO PERFORM AND FAILURE TO PERFORM

A. Introduction

The mirror image model treats satisfaction of the *Hongkong Fir* criterion as necessary to establish repudiation. In cases of delay, the criterion requires proof of frustration of commercial purpose. Our second objection is that the model thereby compromises the distinction between refusal to perform and failure to perform, and its attendant forensic contrast.

Accordingly, three points are made below:

- (1) failure to perform satisfying the *Hongkong Fir* criterion is not in itself a repudiation of obligation;

⁶⁴ *Woodar Investment Development Ltd. v Wimpey Construction UK Ltd.* [1980] 1 W.L.R. 277.

⁶⁵ See *ibid.*, at pp. 282–83, per Lord Wilberforce (with whom Lord Scarman agreed), 287–88, per Lord Salmon, 292, per Lord Russell, 294, per Lord Keith, 298, per Lord Scarman. See also *Gold Coast Oil Co. Pty. Ltd. v Lee Properties Pty. Ltd.* [1985] 1 Qd. R. 416, 420, per Connolly J. (for the court).

⁶⁶ Article 72(1) of CISG is analogous. An “anticipatory breach” occurs if it is “clear” that the promisor “will commit a fundamental breach” (as defined in Article 25). See also UNIDROIT Principles of International Commercial Contracts 2016, Article 7.3.3 (“fundamental non-performance”). Mechanisms dealing with performance insecurity serve to justify the approach. See below, text at fn. 119.

⁶⁷ See e.g. *Bunge GmbH v CCV Landbouwbelaag GA* [1980] 1 Lloyd’s Rep. 458, 461, per Roskill L.J. (with whom Ormrod L.J. and Sir David Cairns agreed); *Rederi Kommanditselskabet Merc-Scandia IV v Coumniotis S.A. (The Mercanaut)* [1980] 2 Lloyd’s Rep. 183, 185, per Lloyd J.

⁶⁸ *Spettabile Consorzio Veneziano di Armamento e Navigazione v Northumberland Shipbuilding Co. Ltd.* (1919) 121 L.T. 628, 635, per Atkin L.J. (approved in *Woodar Investment Development Ltd.* [1980] 1 W.L.R. 277).

- (2) the evidence necessary to establish refusal to perform differs from that used to apply the *Hongkong Fir* criterion; and
- (3) whether the contract would have been “frustrated” is inapposite as a criterion for refusal to perform.

B. *Hongkong Fir and Repudiation*

Breach of condition is the principal basis for discharge under English law. Indeed, once the condition-warranty distinction took hold, repudiation by the promisor was generally perceived to be the only alternative basis.⁶⁹ *Hongkong Fir* was important in recognising that, independently of the doctrine of repudiation, discharge may be based on actual breach of a term which is not a condition.⁷⁰ But the Court of Appeal’s adoption of frustration of commercial purpose as the yardstick in cases of delay stamped the right of discharge as a narrow one.⁷¹ And it ought to go without saying that the court’s objective was not to explicate the doctrine of repudiation.

Hongkong Fir concerned a 24-month time charterparty. The vessel was unseaworthy when it entered into service because its engine room crew was insufficient and incompetent. This breach caused the vessel to be regularly “off-hire” for repairs, and led the dissatisfied charterers to give notice of termination. The shipowners responded by terminating the contract for repudiation. Three arguments were put to Salmon J. by the charterers⁷²: (1) breach of condition; (2) “unreasonable” delay; and (3) delay sufficient to frustrate the commercial purpose of the charter. Salmon J. held that the seaworthiness term was not a condition and that “unreasonable” delay was not the criterion unless it was understood to refer to “frustrating” delay. Since only argument (3) remained, the issue became largely factual.

While the owners’ breach was significant, comparison between the delay caused (and likely to be caused) by the breach and the length of the charter did not support a conclusion of frustration. Salmon J. therefore upheld the owners’ termination and awarded damages for repudiation. The appeal was, of course, dismissed. Nowhere in *Hongkong Fir* is it suggested that the owners would have been held to have repudiated their obligation to perform, had a different conclusion on frustration been reached.

Since under the mirror image model “the test for repudiation has been equated with that for frustration”,⁷³ the model treats discharge for failure to perform an intermediate term as coincident with discharge for

⁶⁹ See e.g. *Associated Newspapers Ltd. v Banks* (1951) 83 C.L.R. 322, 339, per the court.

⁷⁰ Diplock L.J. was concerned to do so without resorting to the device of implying a promissory condition. See *Hongkong Fir* [1962] 2 Q.B. 26, 71 (“unnecessary colophon”). Cf. *Hongkong Fir* [1962] 2 Q.B. 26, 63–64, per Upjohn L.J.

⁷¹ See note 92 below and generally F.M.B. Reynolds, “Warranty, Condition and Fundamental Term” (1963) 79 L.Q.R. 534; D. Nolan, “*Hongkong Fir* Shipping Co. v Kawasaki Kisen Kaisha Ltd., The *Hongkong Fir* (1961)” in Mitchell and Mitchell, *Landmark Cases in the Law of Contract*, p. 269.

⁷² See *Hongkong Fir* [1962] 2 Q.B. 26, 33.

repudiation. It follows that, for the mirror image model, the issue in *Hongkong Fir* was whether the owners had repudiated the contract. For example, in *Ampurius* Lewison L.J. (with whom Longmore and Tomlinson L.J.J. agreed) said⁷⁴: “Salmon J. held that the breaches were not sufficiently serious as to amount to a repudiation; and this court dismissed an appeal against his decision.” With respect, that is incorrect. In the appeal, the charterers took their stand on arguments (1) and (2),⁷⁵ and did not seriously challenge Salmon J.’s conclusion on (3). Therefore, although his entire judgment was endorsed, the point of law on which Salmon J. was affirmed was his adoption of the frustrating delay criterion.

More importantly, no appeal against a decision on “repudiation” by the owners was dismissed: repudiation was never argued by the charterers.⁷⁶ Indeed, Upjohn L.J. contrasted two classes of case:

First there is the case where the owner by his conduct indicates that he considers himself no longer bound to perform his part of the contract; in that case, of course, the charterer may accept the repudiation and treat the contract as at an end. The second class of case is, of course, the more usual one and that is where, due to misfortune such as the perils of the sea, engine failures, incompetence of the crew and so on, the owner is unable to perform a particular stipulation precisely in accordance with the terms of the contract try he never so hard to remedy it. In that case the question to be answered is, does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words is the whole contract frustrated?⁷⁷

From beginning to end, *Hongkong Fir* concerned Upjohn L.J.’s “second class of case”. Repudiation by the owners of their *unperformed* duties never entered the picture. Accordingly, in *Bunge Corp. New York v Tradax Export S.A. Panama*⁷⁸ breach by failure to perform an intermediate term was held to be the doctrinal basis for Diplock L.J.’s judgment. “Repudiation” did not rate a mention.

C. Evidential Considerations

The conceptual contrast between discharge for failure to perform an intermediate term and discharge for repudiation of obligation by refusal to perform necessarily leads to contrasting evidential considerations. To be relevant to the

⁷³ *The Spar Capella* [2016] EWCA Civ 982; [2016] 2 Lloyd’s Rep. 447, at [78], per Gross L.J. (with whom Sir Terence Etherton M.R. and Hamblen L.J. agreed). See also e.g. *Urban 1* [2013] EWCA Civ 816; [2014] 1 W.L.R. 756, at [44].

⁷⁴ *Ampurius Nu Homes Holdings Ltd.* [2013] EWCA Civ 577; [2013] 4 All E.R. 377, at [38]. Cf. *B S & N Ltd. (BVI) v Micado Shipping Ltd. (Malta) (The Seaflower) (No.2)* [2001] 1 Lloyd’s Rep. 341, 352, per Rix L.J., with whom Jonathan Parker L.J. agreed (“*Hongkong Fir* repudiation”).

⁷⁵ See *Hongkong Fir* [1962] 2 Q.B. 26, 56, per Sellers L.J., 65, per Upjohn L.J.

⁷⁶ Salmon J. used “repudiation” to refer to “rescission”. See note 39 above.

⁷⁷ *Hongkong Fir* [1962] 2 Q.B. 26, 64. The passage is quoted in *Ampurius Nu Homes Holdings Ltd.* [2013] EWCA Civ 577; [2013] 4 All E.R. 377.

⁷⁸ *Bunge Corp. New York v Tradax Export S.A. Panama* [1981] 1 W.L.R. 711.

latter, the facts must be capable of influencing the reasonable person whose views determine the promisor's intention. As later events, the factual consequences of a failure to perform are not of that character. By contrast, a promisor's intention is irrelevant to satisfaction of the *Hongkong Fir* criterion, under which factual consequences are determinative.

Whether the promisor refused to perform the contract is also quite beside the point if actual breach of an intermediate term justifies termination. A recent illustration is *Koompahtoo Local Aboriginal Land Council v Sanpine Pty. Ltd.*⁷⁹ Koompahtoo's decision to terminate a joint venture contract was upheld because Sanpine's breach of certain intermediate terms deprived Koompahtoo of substantial benefits. The High Court of Australia said this made proof of refusal to perform unnecessary. Equally, the seriousness of Sanpine's failure to perform did not evidence repudiation. The decision accords with Upjohn L.J.'s contrast in *Hongkong Fir*, which in turn parallels Lord Blackburn's judgment in *Mersey*.⁸⁰ In contrasting failure to perform and refusal to perform, the judgments flatly contradict the mirror image model. In *Mersey*, analysis of the seriousness of the buyers' breach would have been otiose had Lord Coleridge C.J.'s test been met. Conversely, the buyers' bona fides would have been immaterial if they had breached a condition, or committed a sufficiently material breach.

D. "Frustration" Inapposite

It follows that in seeking to determine a promisor's intention (to refuse to perform) by applying the *Hongkong Fir* criterion, the mirror image model adopts an inapposite guide. *The Spar Capella* is an illustration. The case concerned three time charterparties, one for three years and two for six years. For each, the rate of hire was about US\$16,500 per day, and the total value of the contracts therefore around US\$80 million. The charterers were regularly late in paying hire under one or more of the charters for a period exceeding five months. Overdue amounts averaged (roughly) US\$2 million in total. Various excuses were given, including: members of the company group had failed to provide funds, sub-charterers had failed to pay, delay in a capital injection and lack of cash. Delayed management approval was one excuse for not making good in a timely way undertakings to clear arrears.

The facts in *The Spar Capella* clearly justified Gross L.J.'s conclusions⁸¹ that the charterers had "evinced inability to perform the charterparties according to their terms", or had manifested an "intention not to pay hire

⁷⁹ *Koompahtoo Local Aboriginal Land Council* [2007] HCA 61; (2007) 233 C.L.R. 115.

⁸⁰ See note 42 above.

⁸¹ *The Spar Capella* [2016] EWCA Civ 982; [2016] 2 Lloyd's Rep. 447, at [81], [87]. The latter includes a conclusion that the charterers had engaged in conduct that sought to convert a "contract for payment in advance into a transaction for unsecured credit".

punctually in the future”. No question of bona fide conduct arose. The charterers were unreliable performers whose excuses did not rise above “the dog ate my homework”.⁸² There is ample authority⁸³ that Gross L.J.’s conclusions would of themselves establish repudiation under the differentiated model. However, as noted earlier,⁸⁴ the Court of Appeal upheld Popplewell J.’s decision that the charterers had “objectively” evinced an “intention not to perform the charters in a way which deprived [the owners] of substantially their whole benefit”.

Gross L.J. said⁸⁵ it was necessary to assess the “actual and prospective failure to perform the charterparties according to their terms”. However, the reasoning does not satisfactorily overcome the difficulty that the charterers’ breaches – past and prospective – could not frustrate the contracts. In Gross L.J.’s view⁸⁶ “hornbook law” includes that “it is of the essence of the bargain under a time charterparty that the shipowner is entitled to the regular, periodical payment of the hire as stipulated, in advance of performance”. With respect, the statement either second-guesses the court’s conclusion that time was not of the essence or begs the question.

The court agreed with Popplewell J.’s rejection of what Gross L.J. described⁸⁷ as an “arithmetical comparison”. This was the charterers’ argument that outstanding amounts should be compared with the total value of the contracts. For the purpose of applying the *Hongkong Fir* criterion, the charterers’ contention was unassailable.⁸⁸ Under the mirror image model, the amount likely to remain outstanding relative to the value of the contracts was material in the same way that, in *Hongkong Fir*, delay relative to the term of the charter was important.⁸⁹ Given the length of the contracts in *The Spar Capella*, the amounts overdue and the fact that the actual and portended breach was *delay in payment*, the charterers’ conduct was incapable of depriving the owners of substantially the whole benefit of contracts worth US\$80 million.⁹⁰ In our view, lip service was paid to the mirror image model’s translation requirement.⁹¹

⁸² Cf. *Forslind v Bechely-Crundall* 1922 S.C. (HL) 173, 190, per Lord Dunedin (“shilly-shallying attitude in regard to the contract”).

⁸³ See notes 101, 103ff., below.

⁸⁴ See note 24 above.

⁸⁵ *The Spar Capella* [2016] EWCA Civ 982; [2016] 2 Lloyd’s Rep. 447, at [85]. Cf. *The Spar Capella* [2016] EWCA Civ 982; [2016] 2 Lloyd’s Rep. 447, at [82] (“the prospective non-performance foreshadowed”).

⁸⁶ *Ibid.*, at [83].

⁸⁷ *Ibid.*, at [87].

⁸⁸ We ignore the point that the mirror image model logically required *each* charter to be considered on its merits.

⁸⁹ See also, in the sale of goods context, *Maple Flock Co. Ltd. v Universal Furniture Products (Wembley) Ltd.* [1934] 1 K.B. 148, 157, per Lord Hewart C.J., for the Court of Appeal (“ratio quantitatively which the breach bears to the contract as a whole”); *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] Q.B. 44 (percentage of damaged goods, and diminution in value); *Tradax Internacional S.A. v Goldschmidt S.A.* [1977] 2 Lloyd’s Rep. 604 (percentage of foreign matter).

⁹⁰ See also *Kuwait Rocks Co.* [2013] EWHC 865 (Comm); [2013] 2 Lloyd’s Rep. 69, where there is much discussion of whether charterers threatened a breach going to the “root” of the contract even though

The difficulty inherent in the mirror image model is that the evidence must justify the conclusion that, *had the promisor not been at fault*, the contract would have been discharged under the doctrine of frustration. That is, indeed, the linchpin of Diplock L.J.'s judgment in *Hongkong Fir*, and the very reason why his criterion is inappropriate as a test for refusal to perform. Like Lord Radcliffe's⁹² "radically different" test, the *Hongkong Fir* criterion posits a "before and after" comparison under which "arithmetical" comparison is a routine feature, particularly in cases of delay.⁹³ Many frustration cases would have been decided differently had the promisor's conduct been at issue. *Scanlan's New Neon Ltd. v Tooheys Ltd.*⁹⁴ provides a neat illustration. Contracts for the hire of neon signs were not frustrated by wartime orders that prohibited illumination of the signs for an indeterminate period, because the signs had advertising value during daylight hours. But it would undoubtedly be a repudiation for an owner to forbid a hirer to illuminate neon signs for an indeterminate period.

VI. UNEXPLAINED AUTHORITIES

A. Introduction

Legal tests for repudiation by refusal to perform seek to guide the inquiry by describing conduct from which repudiation of obligation is a legitimate inference. Many different formulations can be found. Under Lord Wright's test in *Smyth*, an intention to perform in a "manner substantially inconsistent" with the promisor's obligations is sufficient. Other formulations include an intention not to perform the contract "substantially according to its requirements",⁹⁵ or an intention "to fulfil a contract but only in a way which is inconsistent with the terms of the contract".⁹⁶ For the differentiated model, these tests are – as they were stated to be – sufficient in themselves. Evaluating the promisor's intention at the level of obligation, the question is one of fact, and the only essential legal element is for the conduct at issue to be capable of satisfying the chosen test.⁹⁷

their conduct was a denial of willingness (or ability) to pay hire in full as and when it fell due. Cf. *Northern Foods Plc v Focal Foods Ltd.* [2003] 2 Lloyd's Rep. 728.

⁹¹ Cf. *Valilas* [2014] EWCA Civ 436; [2015] 1 All E.R. (Comm.) 1047, where the majority concluded against repudiation because the *Hongkong Fir* criterion was not satisfied. Underhill L.J.'s dissenting judgment – applying the differentiated model – is more compelling.

⁹² *Davis Contractors Ltd. v Fareham Urban District Council* [1956] A.C. 696, 729.

⁹³ See e.g. *F A Tamplin SS Co. Ltd. v Anglo-Mexican Petroleum Products Co. Ltd.* [1916] 2 A.C. 397; *Tsakiroglou & Co. Ltd. v Noble Thorl GmbH* [1962] A.C. 93; *Ocean Tramp Tankers Corp. v V/O Sovfracht (The Eugenia)* [1964] 2 Q.B. 226.

⁹⁴ *Scanlan's New Neon Ltd. v Tooheys Ltd.* (1943) 67 C.L.R. 169. Cf. *National Carriers Ltd. v Panalpina (Northern) Ltd.* [1981] A.C. 675 (10-year lease of warehouse premises not frustrated when the only access to the warehouse ceased to be available due to a road closure likely to last about 20 months).

⁹⁵ *Koompahtoo Local Aboriginal Land Council* [2007] HCA 61; (2007) 233 C.L.R. 115, at [44], per Gleeson C.J., Gummow, Heydon and Crennan JJ.

⁹⁶ *Dymocks Franchise Systems (NSW) Pty. Ltd. v Todd* [2002] UKPC 50; [2004] 1 N.Z.L.R. 289, at [58], per the court.

The formulations quoted above are insufficient under the mirror image model. In order to validate their use under the model, specific content is given to expressions such as “substantially inconsistent” (*Smyth*) by incorporating the *Hongkong Fir* criterion.⁹⁸ Hence the “such as to” statement in *Urban 1*, and Popplewell J.’s “in a way which” requirement in *The Spar Capella*. The translation process is then employed to evaluate the promisor’s intention at the level of consequences (actual or prospective).

This raises the third problem with the mirror image model’s use of the *Hongkong Fir* criterion. It leaves unexplained cases⁹⁹ in which refusal-to-perform formulations, such as those referred to above, have been conceived and applied as complete tests, sufficient in themselves, including to police the “attitude” of promisors towards their performance obligations.

B. A Typical Situation

That the differentiated model conforms to the case law can be illustrated by the typical situation of a promisor who asserts an entitlement not enjoyed as a matter of law.

Assume that A contracts to provide services for 24 months to B, who agrees to pay on the expiry of each month. What is A’s position if B states an intention to pay within 30 days of the due date? According to the differentiated model, unless B merely expressed a bona fide belief as to the construction of the contract,¹⁰⁰ B has refused to perform the contract. Evaluating B’s intention at the level of obligation, the repudiation is B’s assertion of different terms of payment. However, the mirror image model suggests otherwise. A’s position is evaluated by translating B’s conduct into failure to perform. Each payment is assumed to be made within 30 days of the due date. Because B’s conduct cannot deprive A of substantially the whole benefit of the contract, B did not refuse to perform the contract. That does not square with authority¹⁰¹ or common sense.

C. Policing a Promisor’s Attitude

Ignoring prospective breach of condition, under the mirror image model’s translation process a promisor is taken to have refused to perform only if

⁹⁷ That is how the issue is approached in an appeal. See e.g. *Alfred C. Toepfer International GmbH v Iteq Itagrani Export S.A.* [1993] 1 Lloyd’s Rep. 360, 361–62, per Saville J.

⁹⁸ See note 53 above (“gloss”).

⁹⁹ See e.g. *Forslind* 1922 S.C. (HL) 173, 179, per Viscount Haldane (“sufficient” for a reasonable person to conclude that the promisor “does not intend to perform the obligations he has undertaken”); *Heyman* [1942] A.C. 356, 379, per Lord Wright (“evinces an intention no longer to be bound”).

¹⁰⁰ Cf. *Vaswani v Italian Motors (Sales and Services) Ltd.* [1996] 1 W.L.R. 270, 276, per the Privy Council (bona fide demand for excessive amount not a repudiation).

¹⁰¹ See e.g. *Total Oil Great Britain Ltd. v Thompson Garages (Biggin Hill) Ltd.* [1972] 1 Q.B. 318 (insistence on bankers draft before delivery, when contract required cash on delivery); *BV Oliehandel Jongkind v Coastal International Ltd.* [1983] 2 Lloyd’s Rep. 463, 465, per Leggatt J. (insistence on payment in advance); *Alan Auld Associates Ltd. v Rick Pollard Associates* [2008] EWCA Civ 655; [2008] B.L.R. 419.

it is clear that a particular breach (or breaches) will occur and that the consequences will be very serious for the promisee. In practice, conduct cannot always be analysed in that way; and translation is not necessarily informative. The model therefore discounts considerably use of the repudiation doctrine to police the attitude of promisors towards their obligation to perform. In particular, intentional breach of contract has always been seen as suggestive of repudiation. As Lord Wilberforce said in *Suisse Atlantique Société d'Armement Maritime S.A. v NV Rotterdamsche Kolen Centrale*,¹⁰² “a deliberate breach may give rise to a right for the innocent party to refuse further performance because it indicates the other party’s attitude towards future performance”. This is easily explained by the differentiated model’s concern to evaluate intention at the level of obligation.

Because of what it says about the promisor’s attitude, any intentionally wrongful conduct in connection with a contract is capable of amounting to a refusal to perform. Actual fraud is an obvious example.¹⁰³ Other relevant situations may be loosely grouped as follows. First, a refusal to perform may be found even though translation of conduct into particular breaches would be pure speculation. For example, in *General Engineering Services Ltd. v Kingston and St. Andrew Corporation*¹⁰⁴ the Privy Council took for granted that a “go slow” by firemen was a repudiation of their obligation to perform. It was irrelevant that it could not reliably be predicted that the firemen’s conduct would lead to substantial deprivation of benefit.

Second, conduct signifying intentional repeated breach may be a repudiation notwithstanding its minor financial consequences. Thus, in *Rigby v Ferodo Ltd.*¹⁰⁵ it was common ground that an employment contract was repudiated when an employer reduced the employee’s wages by 5%. Clearly, the financial consequences of the employer’s conduct would not have been severe for the employee.

Third, the concern to police a promisor’s attitude makes it inappropriate simply to weigh the aggregate of contractual benefits against the objective consequences of (projected) breach. Thus, in *Abu Dhabi National Tanker Co. v Product Star Shipping Ltd. (The Product Star) (No.2)*¹⁰⁶ Leggatt L.J. characterised shipowners’ conduct in “wrongfully declining to enter the

¹⁰² *Suisse Atlantique Société d'Armement Maritime S.A. v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 435; see also 394, per Viscount Dilhorne, 429, per Lord Upjohn. See Stannard and Capper, *Termination for Breach of Contract*, §§7.21–7.26.

¹⁰³ See *Boston Deep Sea Fishing and Ice Co. v Ansell* (1888) 38 Ch. D. 339, 362, per Bowen L.J. Cf. *Yam Seng Pte Ltd. v International Trade Corp. Ltd.* [2013] EWHC 111 (QB); [2013] 1 Lloyd’s Rep. 526, at [171], per Leggatt J.

¹⁰⁴ *General Engineering Services Ltd. v Kingston and St Andrew Corporation* [1989] 1 W.L.R. 69, 72; [1988] 3 All E.R. 867, 869. Cf. *Secretary of State for Employment v ASLEF (No.2)* [1972] 2 Q.B. 455.

¹⁰⁵ *Rigby v Ferodo Ltd.* [1988] I.C.R. 29, 33, per Lord Oliver (with whom the other members of the House of Lords agreed). See also *Cantor Fitzgerald International v Callaghan* [1999] 2 All E.R. 411, 420; [1999] I.C.R. 639, 649, per Judge L.J. (with whom Nourse and Tuckey L.J.J. agreed).

¹⁰⁶ *Abu Dhabi National Tanker Co. v Product Star Shipping Ltd. (The Product Star) (No.2)* [1993] 1 Lloyd’s Rep. 397, 407. Mann and Balcombe L.J.J. agreed. See also *Aktieselskabet Pitwood* (1926) 24 Ll L. Rep. 282, where wilful refusal to unload cargo at the agreed place within the port under

Arabian Gulf and yet demanding hire” as a “plain and deliberate abnegation” of their obligation to perform a time charterparty. And a wilful refusal to make one instalment payment may be a repudiation of obligation.¹⁰⁷

Fourth, a contractual relationship is more than the sum of the parties’ performance duties. This is self-evident if a contract creates a distinctive personal relationship. An ordinary employee’s wilful refusal to carry out a lawful instruction was at one time regarded as *ipso facto* a repudiation. While the law has moved on,¹⁰⁸ such conduct remains capable of being so characterised.¹⁰⁹ An agent’s intentional disregard of a principal’s instructions is similar.¹¹⁰ Again, breach of fiduciary duty is usually a repudiation of obligation whether or not the conduct can be translated into a breach of contract. Examples include *SOS Kinderdorf International v Bittaye*,¹¹¹ where an employee made an unauthorised loan to a third party; *Concut Pty. Ltd. v Worrell*,¹¹² where an employee secretly used his employer’s workforce to build his house; and *Nigel Fryer Joinery Services Ltd. v Ian Firth Hardware Ltd.*,¹¹³ where an agent pursued unauthorised outside activities.

In none of the above cases was any attempt made to translate the conduct at issue into specific breaches in order to show that the *Hongkong Fir* criterion was satisfied. Instead, intention was evaluated at the level of obligation, and in each case the promisor’s conduct was held to be a refusal to perform because it was inconsistent with the obligation to perform assumed on entry into the contract at issue. The obvious problem for the mirror image model is that (objective) consequences do not become more serious merely because they derive from intentionally wrongful conduct. There are too many cases to explain away on the basis of implied terms, or as exceptions to the translation process. In policing the “attitude” of promisors towards their performance obligations, the cases illustrate how the doctrine of repudiation responds to the problem of performance insecurity.

CIF contract was held to be a repudiation. The relevant clause required the ship to berth at that part of the port where goods could be discharged by crane, rather than by hand. That the conduct was a repudiation was considered so obvious that counsel for the respondent was not called upon. Cf. *P v A* [2008] EWHC 1361 (Comm); [2008] 2 Lloyd’s Rep. 415, at [19], per David Steel J. (insistence on entitlement to move laycan period).

¹⁰⁷ See *Dymocks Franchise Systems (NSW) Pty. Ltd.* [2002] UKPC 50; [2004] 1 N.Z.L.R. 289, at [59], per the court (franchise contract governed by NSW law). See also *Mafracht v Parnes Shipping Co. S.A. (The Apollonius)* [1986] 2 Lloyd’s Rep. 405, 415, per Bingham J. (deliberate refusal to pay hire under charterparty coupled with threat not to pay in future).

¹⁰⁸ See e.g. *Laws v London Chronicle (Indicator Newspapers) Ltd.* [1959] 1 W.L.R. 698; [1959] 2 All E.R. 285; *Crocs Europe BV v Anderson (t/a Spectrum Agencies (A Partnership))* [2012] EWCA Civ 1400; [2013] 1 Lloyd’s Rep. 1, at [49], per Mummery L.J. (with whom Hughes L.J. agreed).

¹⁰⁹ See also *Gledhill v Bentley Designs (UK) Ltd.* [2010] EWHC 1965 (QB); [2011] 1 Lloyd’s Rep. 270 (verbal abuse).

¹¹⁰ See *Shepherd v Felt and Textiles of Australia Ltd.* (1931) 45 C.L.R. 359.

¹¹¹ *SOS Kinderdorf International v Bittaye* [1996] 1 W.L.R. 987, 993, per the Privy Council.

¹¹² *Concut Pty. Ltd. v Worrell* [2000] HCA 64; (2000) 176 A.L.R. 693, at [51], per Kirby J.

¹¹³ *Nigel Fryer Joinery Services Ltd. v Ian Firth Hardware Ltd.* [2008] 2 Lloyd’s Rep. 108 (CC Man.).

VII. PERFORMANCE INSECURITY

A. Introduction

For all contracts, non-performance by a promisor is a potential risk faced by the promisee. Performance insecurity is created by any event that increases the risk that the promisee will not receive the agreed return for its performance. One function of the common law discharge regime is to address performance insecurity for which a promisor is legally responsible, by defining the circumstances in which a promisee may terminate the contract. Such circumstances may arise before or after arrival of the time for performance; but in all cases exercise of the termination right entitles the promisee to recover loss of bargain damages. Such damages are of course quantified on the basis of non-performance by the promisor of its unperformed duties.¹¹⁴ The important point with which this section of our paper is concerned is that the *availability* of the promisee's right to terminate cannot always be explained on the basis of actual or prospective non-performance.

For failure to perform (actual breach), the contrast between breach of condition and breach of an intermediate term is that only in relation to the latter can the availability of the right to terminate be rationalised on the basis of substantial non-performance. The mirror image model carries over this contrast to cases of alleged repudiation. Accordingly, the default rule for repudiation is proof of prospective substantial non-performance, shown by satisfaction of the *Hongkong Fir* criterion. The fourth problem with the model is that it undermines the use of the repudiation as mechanism to deal with performance insecurity attributable to circumstances which would not inevitably lead to substantial non-performance.

Express termination rights for matters such as material breach also deal with performance insecurity. The fact that such provisions often require the promisor to provide the promisee with an opportunity to remedy its (material) breach illustrates the imposition of an intermediate step, in effect, as a condition precedent to availability of the express right to terminate. There is no general mandate for mechanisms incorporating such intermediate steps in the common law. Nonetheless, the facility to serve a notice to perform following breach of a non-essential time stipulation makes the role of intermediate steps relevant to a comparison of the mirror image model and the differentiated model.

¹¹⁴ See e.g. *Lombard North Central Plc v Butterworth* [1987] Q.B. 527, 535, per Mustill L.J. (with whom Lawton L.J. agreed). Later events may impact on quantification. See e.g. *Bunge S.A. v Nidera BV* (formerly *Nidera Handelscompagnie BV*) [2015] UKSC 43; [2015] Bus. L.R. 987.

B. Increase in the Risk of Non-Performance

The doctrine of repudiation links performance insecurity with circumstances that call into question the readiness, willingness or ability of a promisor to provide the agreed return for the promisee's performance.¹¹⁵ Evolution in the scope of the doctrine¹¹⁶ reflects a concern to ensure its utility as a means of dealing with performance insecurity. However, this role is compromised by the mirror image model.

In the cases on dependent promises, the rationale for excusing a promisee's failure to satisfy a condition precedent to the promisor's obligation to perform was that the latter's conduct signified that the agreed return for the promisee's performance was unlikely to be provided. In relation to the right of the promisee to terminate the contract, the transition of the doctrine of repudiation from being limited to disabling acts to extending to verbal repudiation was a transition from discharge based on the (legal) certainty of non-performance to discharge for conduct that increased the risk of non-performance. An express (and absolute) refusal to perform – as in *Hochster* – illustrates an obvious case of a legally unacceptable increase in the risk of non-performance. But the same legal consequences have long since been accorded to less extreme conduct.

Attempts to define conduct that will, as a matter of law, constitute a refusal to perform focus primarily on a promisor's disclosed lack of commitment, including evidence of unreliability. Hence the concern with a promisor's attitude towards its obligation to perform. Under the differentiated model, the more directed formulations¹¹⁷ state sufficient tests by describing circumstances in which the promisor's intention (to repudiate) would be clear¹¹⁸ to a reasonable person. Expressed in commercial terms, a *material* increase to the risk of non-performance is sufficient under the directed formulations. Through its use of the *Hongkong Fir* criterion, the mirror image model substitutes reasonable certainty that the contract will become substantially worthless to the promisee. The undesirability of this substitution is underlined when specific mechanisms are taken into account.

C. Specific Mechanisms

There is room in the common law for specific mechanisms (or facilities) which respond to performance insecurity without invoking the extreme step of conferring an immediate right of discharge. When a reasonable doubt arises as to the readiness, willingness or ability of a promisor to

¹¹⁵ Hence debate about whether discharge for breach or repudiation is limited to "synallagmatic" contracts (*Hongkong Fir* [1962] 2 Q.B. 26, 66, per Diplock L.J.), and suggestions that a promisee who has fully performed cannot terminate for repudiation. See the discussion in *The STX Mumbai* [2015] SGCA 35; [2016] 1 Lloyd's Rep. 157. The idea was ultimately rejected: at [63].

¹¹⁶ See notes 28ff. above.

¹¹⁷ See notes 95ff. above.

¹¹⁸ See note 68 above (clear or quite plain).

perform, one mechanism would be to permit the promisee to suspend its own performance and demand an assurance of due performance. If a reasonably adequate assurance is not forthcoming, the promisee may terminate the contract. A more specific mechanism is service of a notice to perform in response to the insecurity created by delay in performance. Provided the notice allowed a reasonable time, the promisee may terminate for non-compliance by the promisor.

Use of both mechanisms helps to explain why CISG¹¹⁹ operates analogously to the mirror image model. However, there is no suspension mechanism under English law.¹²⁰ Nor is there a legal right to demand an assurance,¹²¹ even if insecurity derives from a promisor's failure to perform. Of course, either may be created expressly.¹²² But under the common law the promisee must either continue to perform or terminate the contract, thereby taking its chances on proving repudiation.¹²³ Any gap in the common law¹²⁴ created by these limitations afflicts both the mirror image model and the differentiated model. The gap is, however, accentuated for the mirror image model by its use of the *Hongkong Fir* criterion. Furthermore, if a promisee responds to conduct which increases the risk of non-performance by requesting an assurance, the promisor's reaction is a relevant matter.¹²⁵ However, since the reaction goes to the degree of insecurity, rather than the objective seriousness of the promisor's conduct, the role of the promisor's reaction under the mirror image model is difficult to appreciate.¹²⁶

Actual or prospective delay in performance is the most common cause of performance insecurity. Assuming that time is not "of the essence", in *Urban 1* Sir Terence Etherton C. identified¹²⁷ three situations in which a promisee may terminate for "repudiation":

¹¹⁹ Under Article 71 a party may suspend performance pending an adequate assurance of due performance if it "becomes apparent that the other party will not perform a substantial part of his obligations". See also Article 72(2) (restriction on right of termination ("avoidance") for anticipatory breach). Delay by one party entitles the other to "fix an additional period of time of reasonable length for performance" (Articles 47(1), 63(1)) and to avoid the contract if performance does not occur within the time fixed (Articles 49(1)(b), 64(1)(b)). See also UNIDROIT Principles of International Commercial Contracts 2016, Articles 7.1.5, 7.3.4.

¹²⁰ See e.g. *Steelwood Carriers Inc. of Monrovia Liberia v Evimeria Compania Naviera S.A. of Panama (The Agios Giorgis)* [1976] 2 Lloyd's Rep. 192 (no implication from express right to terminate).

¹²¹ See *Universal Cargo Carriers Corp.* [1957] 2 Q.B. 401, 450, per Devlin J.

¹²² See e.g. *BV Oliehandel Jongkind* [1983] 2 Lloyd's Rep. 463, 465 (clause dealing with "impaired" financial responsibility). Conditions precedent to performance operate analogously to an express right of suspension.

¹²³ Cf. *Ferrometal SARL v Mediterranean Shipping Co. S.A. (The Simona)* [1989] A.C. 788 (impact of "unaccepted repudiation").

¹²⁴ See generally G.H. Treitel, "Some Problems of Breach of Contract" (1967) 30 M.L.R. 139, 154, 155; J. J. White, "Eight Cases and Section 251" (1982) 67 Cornell L.Rev. 841; J.W. Carter, "Adequate Assurance of Due Performance" (1996) 11 J.C.L. 1; D. Saidov, "Anticipatory Non-Performance and Underlying Values of the UNIDROIT Principles" (2006) 11 Unif.L.Rev. 795.

¹²⁵ See *Warinco AG* [1979] 1 Lloyd's Rep. 450; *SK Shipping (S) Pte. Ltd.* [2009] EWHC 2974 (Comm); [2010] 2 Lloyd's Rep. 158, at [101]–[107], per Flaux J.

¹²⁶ Compare the treatment of the charterers' undertakings to clear arrears in *The Spar Capella* [2016] EWCA Civ 982; [2016] 2 Lloyd's Rep. 447.

¹²⁷ *Urban 1* [2013] EWCA Civ 816; [2014] 1 W.L.R. 756, at [44].

- (1) if the promisor “demonstrated an intention never to carry out the contract”;
- (2) if delay has deprived the promisee “of substantially the whole benefit” of the contract; or
- (3) if the promisor “demonstrated an intention . . . to carry out the contract . . . in a manner substantially inconsistent with his or her contractual obligations such as to deprive the other party of substantially the whole benefit” of the contract.

Situation (1) can be ignored for present purposes. Sir Terence Etherton C.’s adoption of the mirror image model is apparent in the purely temporal contrast between situations (2) and (3); in the reliance on the *Hongkong Fir* criterion for both; and in the treatment of (2) as a case of repudiation. Under the differentiated model, situations (2) and (3) are conceptually distinct. As we have explained,¹²⁸ in (2) discharge is for failure to perform a contractual term. And since (3) concerns refusal to perform, the statement “demonstrated an intention . . . to carry out the contract . . . in a manner substantially inconsistent with his or her contractual obligations” is a complete test. Satisfaction of the *Hongkong Fir* criterion is not required.¹²⁹

The glaring omission from Sir Terence Etherton C.’s summary is failure to comply with a notice to perform. Although noncompliance with a valid notice disentitles the promisor to specific performance, and may, he said,¹³⁰ be “some evidence” of deprivation of benefit, mere noncompliance is not sufficient evidence of repudiation. If *Urban 1* is correct, under the mirror image model the notice to perform facility has little utility: it is limited to contracts amenable to specific performance; and failure to comply with an effective notice is not a repudiation. By contrast, for the differentiated model, noncompliance evidences a refusal to perform. With all due respect to the Chancellor, in the usual context of a notice to perform an agreement to sell or lease land, the differentiated model is unarguably correct as a matter of authority.¹³¹ Moreover, the notice to perform facility is independent of the remedy of specific performance.¹³² Failure to comply

¹²⁸ See note 79 above.

¹²⁹ See e.g. *Laurinda Pty. Ltd. v Capalaba Park Shopping Centre Pty. Ltd.* (1989) 166 C.L.R. 623 (repudiation inferred from the promisor’s attitude to performance, including deliberate delay).

¹³⁰ *Urban 1* [2013] EWCA Civ 816; [2014] 1 W.L.R. 756, at [44]. See also *The Spar Capella* [2016] EWCA Civ 982; [2016] 2 Lloyd’s Rep. 447, at [104], per Sir Terence Etherton M.R.

¹³¹ See e.g. *Johnson v Agnew* [1980] A.C. 367, 392, per Lord Wilberforce, with whom the other members of the House of Lords agreed (“uncontroversial”); *Behzadi v Shaftesbury Hotels Ltd.* [1992] Ch. 1 (adopting *Louinder v Leis* (1982) 149 C.L.R. 509).

¹³² See e.g. *United Scientific Holdings Ltd. v Burnley Borough Council* [1978] A.C. 904, 934, per Lord Diplock, 958, 962, per Lord Fraser; *Bunge Corp. New York* [1981] 1 W.L.R. 711, 720, per Lord Lowry, 729, per Lord Roskill (with whom the other members of the House of Lords agreed); *Sentinel International Ltd.* [2008] UKPC 59, at [41]–[43], per the court; *North Eastern Properties Ltd. v Coleman* [2010] EWCA Civ 277; [2010] 1 W.L.R. 2715, at [71], per Briggs J. (with whom Longmore and Smith L.J.J. agreed).

with such a notice is therefore one of the presumed positions referred to earlier.¹³³

Sir Terence Etherton C. reasoned¹³⁴ that there is no right at common law to “transform one type of contractual provision (namely, an innominate term or a warranty ...) into something different (a condition ...)”. That right must be conferred expressly.¹³⁵ However, the cases supporting the differentiated model do not rely on “transformation”. What becomes of the essence on service of a notice to perform is compliance with the notice.¹³⁶ The performance insecurity brought about by the promisor’s delay is resolved on the basis that a reasonable person would regard non-compliance (with the notice to perform) as a repudiation of obligation. Underlying the analysis in *Urban 1* is the assumption that the common law dispenses with proof of substantial non-performance – actual or prospective – only for breach of condition. This misconception is directly attributable to use of the mirror image model.

VIII. CONCLUSIONS

There is no denying that the doctrine of repudiation is complex. In order to debate its more challenging aspects we have compared two models.

The “mirror image model” posits a process under which a promisor’s conduct (or position) is “translated” into a failure to perform. Discharge for repudiation depends on proof that the promisor’s conduct would have become a breach of condition or breach of an intermediate term satisfying the *Hongkong Fir* criterion, that is, deprivation of “substantially the whole benefit” of the contract. In contrast, the “differentiated model” treats the various situations analysed in terms of discharge for repudiation as differentiated by the criteria on which they rely. The translation process is necessary only when prospective breach or factual inability is invoked.

“Refusal to perform” a contract lies at the heart of the repudiation doctrine. Ostensibly, for both models the promisor’s intention is at issue, as determined by a reasonable person in the position of the promisee. However, disagreement about the scope of the translation process means that the two models diverge if the promisor’s conduct is referable to only some of its unperformed duties. The differentiated model examines the issue at the *level of obligation* and time-honoured tests, such as Lord Wright’s formulation in *Smyth*, are sufficient in themselves. Satisfaction of these tests means that the promisor repudiated its obligation to perform

¹³³ See note 48 above.

¹³⁴ *Urban 1* [2013] EWCA Civ 816; [2014] 1 W.L.R. 756, at [44]. See also *Samarenko v Dawn Hill House Ltd.* [2011] EWCA Civ 1445; [2013] 1 Ch. 36, at [65], per Rix L.J.

¹³⁵ No authority is cited for the view that notices to complete given under provisions in standard form sale of land contracts operate by way of “transformation”.

¹³⁶ See *Stickney v Keeble* [1915] A.C. 386, 418–19, per Lord Parker; *United Scientific Holdings Ltd.* [1978] A.C. 904, 946, per Lord Simon.

the contract. By contrast, the mirror image model determines the promisor's intention at the *level of consequences*. The default rule for refusal to perform is translation of the promisor's conduct into a breach satisfying the *Hongkong Fir* criterion. It is not in our view open to proponents of the mirror image model to support it on the basis that the model is not intended to be all-encompassing, and does not therefore call into question use of the differentiated model. Thus, the reasoning in cases such as *Urban 1* and *The Spar Capella* is that adoption of the mirror image model is at the expense of any other model. Those cases carry the mirror image model to its logical, but uncommercial, conclusion.

We have supported the differentiated model as the better model – and the preferred view of the common law – by analysing four problems with the mirror image model. Given that the mirror image model is in imminent danger of passing into orthodoxy,¹³⁷ resolution of these problems is a matter of some urgency. Our main points are as follows. The first relates to the interaction between discharge for failure to perform (breach of a contractual term) and discharge for refusal to perform. Leading cases such as *Mersey* and *Hongkong Fir* illustrate that the distinction is a key feature of the common law. There is no direct correlation between the two concepts. Therefore, proof of satisfaction of the *Hongkong Fir* criterion is not – as the mirror image model would have it – coincident with proof of repudiation.

The second concerns the scope that should be accorded to prospective breach as a basis for proving repudiation. *Federal Commerce* established that prospective breach in the form of a threat to breach an intermediate term may amount to a repudiation. However, Lord Wilberforce's judgment does not support the mirror image model's analysis of all cases of alleged repudiation in terms of prospective breach. In particular, Lord Wilberforce did not treat the translation process (and application of the *Hongkong Fir* criterion) as qualifying the tests for refusal to perform stated in cases such as *Freeth* and *Smyth*.

Third, it is basic to the concept of repudiation by refusal to perform that the (objective) intention of the promisor is at issue. Because it loses sight of the fact that intention (to refuse to perform) is evaluated at the level of obligation, the mirror image model cannot explain a substantial body of authority, including cases emphasising the importance of the promisor's attitude towards its obligation to perform. In addition, *The Spar Capella* illustrates that the *Hongkong Fir* criterion is not a reliable guide to intention. It is, indeed, implausible to suggest that in every case in which repudiation of obligation has been established the contract would have been frustrated had the promisor not been at fault.

¹³⁷ See note 2 above.

Fourth, the mirror image model's adoption of satisfaction of the *Hongkong Fir* criterion as the default rule limits discharge for refusal to perform to situations in which it is clear that the contract will become substantially worthless for the promisee. The mirror image model lacks commercial credibility. The common law has few specific mechanisms to deal with conduct that materially increases the risk of non-performance. In addressing such conduct the doctrine of repudiation fulfils an important role. The analysis in *Urban I* is particularly troubling. Insistence on (actual or prospective) satisfaction of the *Hongkong Fir* criterion contradicts the orthodox view that noncompliance with a notice to perform is a repudiation. The analysis therefore removes the most important common law mechanism dealing with the performance insecurity inherent in indeterminate delay.